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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KALEEM RAY MOORE et al., Defendant and Appellant.	D074567 (Super. Ct. No. 16CR016503)

APPEAL from a judgment of the Superior Court of San Bernardino County, Lisa M. Rogan, Judge. Affirmed in part and reversed in part, with directions.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Kaleem Ray Moore.

Matthew A. Siroka, under appointment by the Court of Appeal, for Defendant and Appellant Mark Smith.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Kaleem Moore and Mark Smith robbed a Walmart store during the overnight shift, holding three employees at gunpoint in the process. A jury found the defendants guilty of three counts of second degree robbery (Pen. Code, § 211),[1] found true the allegation that each defendant personally used a firearm in the commission of the offense (§ 12022.53, subd. (b)), and found them not guilty on three counts each of kidnapping to commit robbery (§ 209, subd. (b)(1)). The trial court sentenced each defendant to 23 years eight months in prison—seven years for the robbery convictions, and 16 years eight months for the firearm-use enhancements.

Moore contends the trial court erred by denying his motion to quash a search warrant and to suppress the highly incriminating evidence obtained during the related search. He maintains the affidavit on which the warrant was issued contained deliberate or reckless falsehoods, without which no probable cause existed. Based on our independent review of the affidavit, we conclude Moore's contention lacks merit.

Smith, who elected before trial to represent himself, contends the trial court erred by advising him that his waiver of counsel would become irrevocable once the jury entered the courtroom. He maintains this was a preemptive denial of his constitutional right to counsel. This contention also lacks merit.[2]

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1 Further statutory references are to the Penal Code unless otherwise indicated.

2 Smith asserts a substantially similar claim in a petition for writ of habeas corpus. In a separate order, we deny the petition based on conclusions we reach in this opinion.

In supplemental briefs, Moore and Smith contend we should remand the matter for resentencing in light of an intervening legislative amendment that now allows the trial court to exercise discretion with respect to striking firearm enhancements. (§ 12022.53, subd. (h).) The Attorney General concedes remand for resentencing is appropriate. We agree. Accordingly, we vacate the sentence and remand for resentencing as specified in the Disposition. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Moore and Smith were charged with three counts each of kidnapping to commit robbery (§ 209, subd. (b)(1)) and second degree robbery (§ 211), with firearm personal-use enhancement allegations (§ 12022.53, subd. (b)).[3]

Prosecution Evidence

In the early morning hours of May 4, 2016, maintenance worker Ralph D. was working the overnight shift at a Walmart store in Victorville. A female employee told him two men were in the women's restroom. Ralph reported this information to two assistant managers (Ron R. and D.D.), who investigated but did not find anyone. Ralph later saw two men in the middle of the store dressed in black and wearing neon green safety vests. One of the men was wearing black and white "Chuck Taylor" Converse shoes, and the other was wearing black "Jordan" shoes. The men's faces were not covered, and Ralph identified Smith at trial as one of the two men. When Ralph asked

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[3] An additional accomplice, Shontel Mott, initially faced the same charges. However, the trial court suspended proceedings as to Mott based on concerns regarding her competency.

the men what they were doing there, they said they were cleaning the floors. Ralph "immediately knew something was going on" because that was his responsibility that night. Ralph calmly left to alert Ron and D.D. to the suspicious men's presence.

In the meantime, the assistant managers were standing in the front of the store when the two suspects came around a corner toward them. The suspects wore hoodies, leaving only a portion of their faces showing. Nevertheless, at trial the managers identified Moore and Smith as the suspects. When one of the managers asked the men to remove their hoods and how he could help them, the suspects each pulled out a gun and said, "[t]his is how you can help us." The suspects told the managers to take them to the "CO," or "cash office," and warned the managers not to "try anything funny" because "they know where it's at." As the group walked toward the cash office, the suspects saw maintenance worker Ralph and told him, "[g]et over here, or I'm going to shoot your ass." Ralph complied, and the five men then headed to the cash office, about 25 to 50 feet away.

Assistant manager D.D. unlocked the door to the cash office, and the suspects told the employees to get on the floor. Due to limited space in the "very tiny" cash office, Ralph laid down on the floor, Ron "halfway laid down," and the suspects had D.D. remain standing. The suspects asked D.D. to open the "war wagon"—a heavy, rolling, locked cart into which "money bags" of cash from the registers are deposited. The managers explained they did not have the keys to the war wagon on their key chains. One of the suspects escorted D.D. at gunpoint to another office about 400 feet away to

retrieve the keys to the war wagon. While D.D. and the first suspect were gone, the suspect in the cash office spoke by walkie-talkie to the first suspect and to a third suspect.

D.D. returned with the keys, unlocked the war wagon, and helped place the money bags into pillowcases the suspects provided. The other suspect loaded up money bags that were already in the cash office. Once the pillowcases were loaded, the suspects took the employees' cellphones and said they would leave them by the shopping carts at the store entrance. The suspects handcuffed D.D. to the war wagon and left. The suspects took approximately $80,000.

As the suspects left the cash office, D.D. kicked the door closed so it would lock, then announced on his walkie-talkie for any employee listening to call 911. Ron called 911 from a landline inside the cash office. After 20 or 30 seconds, D.D. left the cash office still shackled to the war wagon, and observed a trail of money bags the suspects had dropped on their way out. He put them in the war wagon.

Employee Justin A. was in his car in the parking lot on his lunch break when he heard the call for help on the walkie-talkie. Justin approached the store's open front door, saw the suspects approaching, and manually closed the sliding door. One of the suspects asked him, "Do you want to get shot, homey?" Justin responded, "Nope," backed away, and ran back toward his car. Justin saw a gold Jeep with no license plates speed toward the store. The two suspects got in the Jeep, and it sped away. Justin called 911, and law enforcement arrived within minutes.

Justin found the assistant managers inside the store and went to the hardware section to retrieve bolt-cutters to free D.D. from the war wagon. Justin then helped Ron

look for his cellphone near the cart area, but they could not find the phone. Using Justin's cellphone, Ron tracked his own phone with a GPS locator "app," which located the device several miles away. Justin showed his phone to one of the responding sheriff's deputies, who had Justin accompany him in a sheriff's vehicle to locate the missing phone.

The locator app led Justin and the deputy to an apartment complex on La Paz Drive in Victorville, about three freeway exits away from the Walmart. Additional deputies arrived. Justin and the deputies looked on foot for the Jeep. The complex consisted of several rows of buildings, each containing four 2-story townhomes. About two buildings into the complex, Justin saw a gold Jeep with no license plates, which he recognized "[r]ight away" as the suspects' getaway vehicle.

The Jeep was parked in a carport stall about five or ten feet from one of the buildings, and "just outside" or "right in front of" Apartment 17. One of the responding deputies, Gustavo Garcia, observed that the Jeep looked like it "had been parked in a hurry" because it was at a 45-degree angle. He further observed that the Jeep was warm to the touch, while a neighboring vehicle felt cold, indicating the Jeep "had just been driven and parked." In plain view inside the Jeep he saw license plates, a walkie-talkie, a cellphone, and binoculars.

While "canvassing around the car for evidence," Deputy Garcia saw "distinctive shoe impressions coming from [Apartment] 17 towards the vehicle" and "on the driver's side of the car." From prior investigative experience, and from personal experience in owning several pairs, Garcia believed the shoe impressions matched a Chuck Taylor

Converse shoe. He also saw shoe impressions from "a sport shoe" outside Apartment 17. The deputies summoned additional law enforcement assistance and established a perimeter around the residence.

Deputy Garcia knocked on the door to Apartment 17 so loudly that it woke the occupants in Apartment 18. A light came on directly above Garcia, but nobody answered the door. Garcia yelled to the occupants that he wanted them to come downstairs to talk. About two hours later, Moore, Smith, and Shontel Mott exited the apartment.

After obtaining a search warrant (the circumstances of which we discuss in detail in part I.A., *post*), law enforcement searched Apartment 17 and found the following evidence: one pair of Chuck Taylor Converse shoes (size five and a half) and one pair of "Jordan Retro 11[]" shoes; two black handguns (one hidden in the tank of a toilet, the other in a safe); one neon vest; one pair of red, black, and gray gloves matching those seen in Walmart's surveillance footage of the robbery; one pair of blue gloves; a keychain with a Jeep Commander key on it; 25 money bags located between the coffee table and couch; eight money bags containing coins; a bag full of Walmart receipts; a large amount of currency stacked on the coffee table; additional currency wrapped in a sheet partially hanging from an attic access point; additional currency between the mattress and box spring of the bed in the master bedroom;[4] and a Walmart paystub addressed to Moore.

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4 Also in the master bedroom, deputies found a cellphone with a police scanner app that was monitoring their transmissions.

Excluding coins and checks, law enforcement recovered approximately $60,000 in currency from the apartment.

In addition to testimony from the Walmart and law enforcement witnesses, the prosecution presented extensive video surveillance footage from the Walmart store.

Defense Evidence

Neither Moore nor Smith testified or presented any other affirmative evidence. In closing, Moore's counsel essentially conceded the robbery counts,[5] but argued there was insufficient asportation to support the kidnapping counts, which carry a life sentence. (§ 209, subd. (b)(1).) Smith argued in closing that he had been misidentified by the victims.

Verdicts and Sentencing

The jury found Moore and Smith not guilty of the three kidnapping counts, and guilty of the three robbery counts. The jury also found true the firearm-use allegation attached to each robbery count.

The trial court sentenced each defendant to 23 years eight months in prison, consisting of the following consecutive terms: a five-year principal term for the first robbery count (the aggravated term on a 2/3/5-year triad under § 213, subd. (a)(2)); two 1-year subordinate terms for the remaining robbery convictions (one-third of the three-year middle term); a 10-year term on the firearm-use enhancement attached to the

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5 For example, Moore's counsel argued: "I'm not going to argue the robbery. It speaks for itself in my opinion. We have all the evidence that seems like a lot. We see guns. We see people. We see clothing. We see money in the house where Mr. Moore is arrested. The robbery, in my opinion, of course, you're the triers of facts, is there."

principal robbery count; and two additional three-year four-month terms for the firearm-use enhancements attached to the subordinate robbery counts (one-third of each 10-year enhancement).

DISCUSSION

I. *Moore's Motion to Quash and Suppress*

Moore contends the trial court erred by denying his motion to quash the search warrant and to suppress the resulting evidence because the law enforcement affidavit supporting issuance of the warrant "contained false and misleading statements," without which probable cause would have been lacking. We disagree. Even with the challenged content excised or corrected, the affidavit provided sufficient probable cause to support the search warrant.

A. *Background*

Sheriff's deputy Asiah Medawar remained at the Walmart as other deputies tracked Ron's cellphone to the apartment complex. There, she interviewed the three robbery victims, viewed Walmart's surveillance footage of the robberies, and monitored law enforcement radio traffic. Based on information she learned from these sources, Medawar traveled to the Victorville police station and prepared an affidavit in support of a search warrant for Apartment 17.

In her affidavit, Deputy Medawar stated the robbery occurred at approximately 2:40 a.m.; the suspects were each armed with a black handgun; the suspects wore black clothing, neon vests, and black and red gloves; one suspect wore black and white Converse shoes, while the other wore sport shoes; the suspects took Ron's cellphone with

them; and the suspects fled in a "gold colored newer model Jeep" with no license plates that met them at the front of the store.

Deputy Medawar attested to the following facts that she believed supported a finding of probable cause:

> "[Ron] was able to track his cell phone to the area of Union and La Paz [D]rive. Deputies conducted an area check and located a gold colored [J]eep with no plates, parked in the parking lot of the apartments at . . . La Paz [D]rive. Deputies were able to track [C]onverse shoe prints to apartment number 17. Deputies were able to look into the window of the apartment and see a ne[o]n vest, black hat, black [C]onverse shoes, and red and black gloves. Deputies have given multiple verbal commands and made announcements but received no response. Deputies seen [*sic*] subjects looking out the rear window of the apartment.
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> "Based on the aforementioned information, I believe sufficient probable cause exists for the issuance of a search warrant. Based on the dangers of armed suspects and the safety of deputies and the public, I believe there [are] exigent circumstances for the warrant to be served at night."

Judge Christopher Marshall issued a search warrant at 4:52 a.m., with "night service approved." (Capitalization omitted.)

As described in our factual summary, law enforcement's search of Apartment 17 yielded highly incriminating evidence, including a neon vest, Converse shoes, hidden handguns, $60,000 in currency, Walmart receipts, and a Walmart paystub addressed to Moore.

Moore moved to quash the search warrant and to suppress the resulting evidence. Based on conflicting information in Deputy Garcia's subsequent police report regarding the incident, Moore argued in his motion that Deputy Medawar's affidavit contained

several misstatements that were either "lies" or made with "a reckless disregard of the truth." First, whereas Medawar's affidavit stated that "[d]eputies were able to track [C]onverse shoe prints *to* apartment number 17," Garcia stated in his report that the Converse impressions "were heading *away* from apartment #17 and were walking *towards* the Jeep . . . ." (Italics added.)

Second, Medawar stated in the affidavit that "[d]eputies were able to *look into the window* of the apartment and see a ne[o]n vest, black hat, black [C]onverse shoes, and red and black gloves." (Italics added.) Deputy Garcia, on the other hand, wrote in his report that he saw these items only after opening the door to Apartment 17 to secure the residence while they obtained a search warrant.[6] Ultimately, Garcia wrote, he decided against entering the unit once he observed that the two-story floor plan put him and other deputies in "a poor tactical position" vis-à-vis the "armed and dangerous" suspects. Instead, Garcia waited for backup (which included a SWAT team) and radioed for Deputy Medawar to head to the Victorville police station to "author a search warrant for the residence."

As a third inconsistency, Moore argued in his motion that Deputy Medawar stated in her affidavit that the deputies had seen subjects looking out the rear window of the

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6 Deputy Garcia wrote in his report: "Based on the evidence located during my investigation, the fact the suspect knew we were at the residence and the possible destruction of incriminating evidence, I felt I had sufficient probable cause to secure the residence for a search warrant. I checked the door knob and noticed that the bottom lock was unlocked, but the deadbolt was secured. I pulled on the center of the door[']s window and was able to make it bow enough to stick my arm in. I unlock[ed] the front door and pushed it open. Immediately [upon] opening the front [door], I observed a neon vest and red and gray gloves used by the suspect during the robbery."

apartment, whereas Deputy Garcia's report was silent on this topic. Relatedly, although not an inconsistency, Moore argued that a passage in Garcia's report regarding a light coming on while Garcia knocked on the apartment door was not probative of anyone being in the apartment, as the light could have been triggered by a motion or sound detector.

The prosecution opposed Moore's motion. The prosecution argued exigent circumstances justified Deputy Garcia's warrantless entry into Apartment 17 to secure it pending issuance and execution of a search warrant and, thus, his observations of evidence in plain view were properly included in the affidavit. The prosecution argued the discrepancy regarding how Garcia observed the evidence in the apartment was attributable to the fact Deputy Medawar was not at the scene and based her affidavit on her monitoring of radio traffic. Alternatively, the prosecution argued that even if the evidence observed inside the apartment were excised, Medawar's affidavit still provided probable cause to issue the warrant. Finally, the prosecution argued that even if the search warrant were invalid, the "good faith" exception to the exclusionary rule applied.

The trial court denied Moore's motion. First, the court found the deputies had "legitimate probable cause" to secure Apartment 17 while they obtained a search warrant. The court explained its probable-cause finding:

> "The deputies followed signals of a stolen cellphone to that, and I'll just say general area. What they found was a car matching the description, with no license plate. A very specific description, as far as I 'm concerned. A gold, I think it was a Jeep, no license plate, engine was warm indicating that it had just been driven, the crime had just occurred, goes further to the probable cause. And there

> were shoe prints that were consistent with what the suspects of that crime were wearing.
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> "Now, the shoe prints, whether or not they were to and from, but in the general area of that car, and apartment 17. Right? Whether they went from one point to the next point, the Court doesn't find that to be dispositive. That they were near the car that fit the description, that car had a warm hood, the crime had just occurred, and then they led to, or were at the door of or near unit 17 is part of probable cause. That's legitimate probable cause."

Because the court concluded the deputies had probable cause to open the apartment door, the evidence they saw in plain view was properly included in the affidavit. The court agreed with Moore that the assertion in Deputy Medawar's affidavit about the on-scene deputies seeing evidence through the apartment window was "false," but the court was not convinced it was "a lie" because Medawar "was not at the residence, and was only monitoring the radio dispatch to obtain that information, [so] it's reasonable to conclude that perhaps there may have been a misunderstanding about how that observation was made . . . ." The court, therefore, concluded the appropriate remedy was to excise the false statement in the affidavit about *how* the observation was made, but not *what* was observed.

The court expressed "concern[]" about the potential "reckless[ness]" of the statement in the affidavit that deputies saw someone in the apartment looking out the window. But without a recording or transcript of the radio traffic—which the parties had but the court did not—the court was "not going to make [the] leap without knowing for sure."

In addition to finding that the search warrant was supported by probable cause, the court also found the good faith exception was "in effect."

B. *Relevant Legal Principles*

A magistrate may issue a search warrant upon a showing of probable cause, supported by affidavit. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 13; § 1525.) "The task of the issuing magistrate" in determining the existence of probable cause "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) "The showing required in order to establish probable cause is less than a preponderance of the evidence or even a prima facie case." (*People v. Carrington* (2009) 47 Cal.4th 145, 163 (*Carrington*); see *Gates*, at pp. 243-244, fn. 13 ["probable cause requires only a . . . substantial chance."].)

A search warrant is presumed valid. (*People v. Amador* (2000) 24 Cal.4th 387, 393.) " 'Thus if the defendant attempts to quash a search warrant, . . . the burden rests on him.' " (*Ibid*.) "A defendant claiming that the warrant or supporting affidavit is inaccurate or incomplete bears the burden of alleging and then proving the errors or omissions." (*Ibid*., citing *Franks v. Delaware* (1978) 438 U.S. 154, 171-172 (*Franks*).) "[I]t is settled that 'the warrant can be upset only if the affidavit fails as a matter of law . . . to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to

appraise and weigh evidence when presented by affidavit . . . .' " (*People v. Hobbs* (1994) 7 Cal.4th 948, 975.)

"A defendant has a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. The trial court must conduct an evidentiary hearing only if a defendant makes a substantial showing that (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause." (*People v. Scott* (2011) 52 Cal.4th 452, 484; *Franks*, *supra*, 438 U.S. at pp. 154-156.) "A defendant who challenges a search warrant based on *omissions* in the affidavit bears the burden of showing an intentional or reckless omission of material information that, when added to the affidavit, renders it insufficient to support a finding of probable cause." (*Scott*, at p. 484.) "In either setting, the defendant must make his showing by a preponderance of the evidence, and the affidavit is presumed valid." (*Ibid*.)

"We defer to the trial court's express and implied factual findings if supported by substantial evidence, but we independently determine the legality of the search under the Fourth Amendment." (*People v. Eubanks* (2011) 53 Cal.4th 110, 133.) "Doubtful or marginal cases are resolved in favor of upholding the warrant." (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.)

C. *Analysis*

Moore has not met his burden of showing the trial court erred because we conclude Deputy Medawar's affidavit provided probable cause to issue the search warrant

even after excising all the challenged content (i.e., the evidence Deputy Garcia observed inside Apartment 17 and the claim that deputies saw someone looking out a window).

The suspects took Ron's cellphone. With eyewitness assistance, deputies tracked it to a specific intersection. Once there, deputies "conducted an area check" and located a gold Jeep with no license plates, which the trial court aptly described as "a very specific description." The Jeep was in the parking lot of an apartment complex, and "[d]eputies were able to track [C]onverse shoe prints"—like those worn by one of the suspects—"to apartment number 17." We agree with the trial court that the direction the shoe impressions were heading is not dispositive; the material fact is that the shoeprints linked the suspect vehicle to Apartment 17 in *any* direction.[7]

The significance of the deputies' observations is amplified by the fact they were made within about two hours of the robbery. The affidavit and search warrant indicate that the robbery *began* at about 2:40 a.m. and the warrant issued at 4:52 a.m. This timeline becomes even more compelling after subtracting the time it took for the robbery to occur, for Deputy Medawar to drive from Walmart to the police station and to prepare and transmit the warrant application, and for the magistrate to review the application and issue the warrant. The magistrate had firsthand knowledge of this limited timeframe.

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[7] We disagree with Moore's assertion that the affidavit is necessarily misleading with respect to the direction of the shoeprints. The statement that deputies "were able to track converse shoe prints to apartment number 17" does not indicate the direction the shoes traveled, only that they traveled between those two locations.

Considering the totality of these circumstances in light of the showing required to establish probable cause—"less than a preponderance of the evidence or even a prima facie case" (*Carrington*, *supra*, 47 Cal.4th at p. 163)—we conclude Deputy Medawar's affidavit provided probable cause to issue the search warrant even without considering the deputies' observations inside Apartment 17.[8]

Moore argues the search warrant should nonetheless be quashed because the deputies would not have sought it had they not seen the evidence inside Apartment 17. We disagree. In addition to the evidence set forth in the probable cause affidavit, the deputies were also aware of the following information: the Jeep was warm to the touch, indicating it had recently been driven in the very early morning hours; the Jeep appeared to have been hastily parked at a 45-degree angle; a walkie-talkie, cellphone, and binoculars were inside the Jeep in plain view; the Jeep was parked in a carport stall "just outside" or "right in front of" Apartment 17; the carport was about five or ten feet from the building; and Deputy Garcia (per his police report) "knocked on the . . . door for several minutes and noticed a light came on directly above [him]."[9] Armed with this

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8 We therefore need not, and do not, consider whether (1) exigent circumstances justified the deputies' warrantless entry into Apartment 17, (2) Moore's trial counsel performed ineffectively for failing to pursue this theory, or (3) the good faith exception to the exclusionary rules applies. In addition, although we need not resolve the issue, the record supports the trial court's finding that there is insufficient evidence from which to conclude the probable cause affidavit contained deliberate or reckless falsehoods or omissions.

9 The fact the deputy knocked for several minutes before the light came on casts doubt on Moore's motion/sound-detector theory.

information, it is virtually certain the deputies would have sought a search warrant without having seen the evidence inside Apartment 17. Indeed, Deputy Garcia concluded this evidence provided probable cause for him to make a warrantless entry into Apartment 17 to secure the unit pending issuance of a search warrant.

In sum, even with the challenged material in Deputy Medawar's affidavit excised, the affidavit still provided probable cause to issue the search warrant. Thus, the trial court did not err by denying Moore's motion.

II. *Smith's Self-representation*

Smith was represented by appointed counsel throughout the pretrial proceedings. When that counsel's temporary unavailability was going to require a further continuance of the trial date, Smith moved under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) to represent himself so trial could proceed as scheduled. After advising Smith repeatedly about the advantages of being represented by experienced counsel, and after giving him over a week to consider the matter, the trial court granted Smith's *Faretta* request. Smith now contends the admonitions the trial court gave him during these proceedings, though "well-intentioned," constituted an improper "preemptive waiver" of his right to counsel. We disagree.

A. *Background*

Smith was represented by appointed counsel during pretrial proceedings. The court initially set a jury trial to commence on September 19, 2016. For reasons not disclosed in the appellate record, the court appointed substitute counsel for Smith and

continued the matter so the new counsel could "review the file." At a later hearing (September 16), the court set a jury trial to commence on October 3.

On September 30, just a few days before trial was set to commence, Smith's new counsel filed a motion to further continue the matter so he could "review at proper length" the "considerable volume of photographic and video recorded evidence" and to "at least attempt to interview" "several critical witnesses." That same day, the court held a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 to address Smith's dissatisfaction with the pace of trial preparation. Smith ultimately agreed to remain represented by his current counsel, and the trial court continued the trial date to October 31.

For reasons not made clear in the appellate record, the court later continued the trial date to November 28. In the meantime, Moore filed his motion to quash and suppress, and the court further continued the trial date to allow for a briefing schedule and hearing. At the December 16 motion hearing, Moore's counsel represented that Smith's replacement counsel had asked him "to stand in for" him at the hearing and to request that the court "put over the case to about the last week of January" because Smith's counsel was "still in trial . . . in a homicide case." After denying Moore's motion, the court continued the matter to December 30, the final date to which Smith and Moore had previously agreed to waive time.

At the outset of the December 30 hearing, Smith told the court, "you know, the issues in our *Marsden* hearing have gotten no better." The court acknowledged it had received a *Faretta* waiver form from Smith. The court confirmed that Smith was requesting to represent himself at trial because he wanted to proceed to trial but his

counsel would not be available until about three or four weeks later. Smith confirmed that he understood he was facing a possible life sentence, and that he was willing to risk that sentence to avoid further delay. The court advised Smith it thought he would be making "a huge, huge mistake" to take this trade-off. The court repeatedly advised Smith against forgoing counsel, and Smith ultimately agreed to think about the decision for about a week (until January 9). The court assured Smith that if he still wanted to assert his *Faretta* rights then, the court would grant his request and they would start trial the next day.

At the January 9 trial readiness conference, Smith's counsel informed the court that "Smith is still anxious to represent himself and go forward." The court confirmed that Smith understood he had no prior trial experience; he would "be facing an experienced attorney"; the court would not be able to help him; he would "be treated like any other lawyer in the room, have to know [the] rules, and all of that"; and that he had not yet received all of his case file from his counsel. Although the court was "still feeling that it's not a very good idea," the court "respect[ed]" Smith's decision and granted his *Faretta* request. The court informed the parties that trial would begin the next day.

The next morning (January 10), the court conferred with Moore's counsel and Smith regarding a variety of trial matters, including the fact Deputy Medawar would be unavailable until after the anticipated close of trial. Smith confirmed he was willing to proceed without her, and that he was "still ready" for trial. Court recessed until the following morning for jury selection.

At the outset of proceedings the next day, the trial court made one "last effort" to persuade Smith to obtain counsel: "Mr. Smith, this is going to be my last effort to talk to you, because once we start, if you say in the middle of trial, [']I made a mistake. I need an attorney,['] it's too late. You have to go all the way through." The court reiterated the difficulties of self-representation, including that Smith had only recently received certain discovery and was unable to view CDs containing certain video evidence. The court gave one final admonition:

> "I really want you to consider if everything goes wrong, was this the right decision for me. [¶] . . . [¶] And once I bring that jury in, no more. I'm not going to stop the trial. I'm—I'm going to feel bad for you, for sure, but I'm not stopping the trial. And I can't help you. [¶] . . . It really causes me some concern. But you're certainly entitled to do what you're doing. I mean I can't help you beyond this. All I want to do is take this last moment to say please consider what you're doing. And if you want to go forward, and you say, 'You know what, Judge, if everything goes wrong, it's all right. I'm still going to be content with my decision, and I'll walk away knowing that was my decision.' That's fine. That's fine. I just want to extend to you this last opportunity before I bring that panel in."

After Smith responded, "Yes," Moore's counsel requested and was granted leave to speak with Smith. After this pause in the proceedings, the court told Smith, "if you need time to think about it, you tell me, I'll give you all the time you want." Smith responded, "I've prayed on it enough. I believe I'll be okay. I'm willing to continue."

B. *Relevant Legal Principles*

"A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the

United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. [(*Faretta*, *supra*, 422 U.S. at p. 819.)]" (*People v. Marshall* (1997) 15 Cal.4th 1, 20.)

"When a criminal defendant who has waived his right to counsel and elected to represent himself . . . seeks, during trial, to revoke that waiver and have counsel appointed, the trial court must exercise its discretion under the totality of the circumstances . . . ." (*People v. Lawrence* (2009) 46 Cal.4th 186, 188 (*Lawrence*).) Relevant circumstances for the court to consider include, but are not limited to, the following: (1) the defendant's history of substituting counsel; (2) the reasons the defendant gave for requesting the reappointment of counsel; (3) the length and stage of the trial court proceedings; (4) the likelihood the defendant would be effective in defending against the charges if required to proceed as his or her own attorney; and (5) the delay or disruption revocation is likely to cause the court, the jury, and other parties. (*Id.* at p. 196; see *People v. Gallego* (1990) 52 Cal.3d 115, 164.)

Had Smith sought during trial to withdraw his *Faretta* rights and to have the court appoint counsel to represent him, the request would have been subject to the trial court's discretion. (*Lawrence*, *supra*, 46 Cal.4th at p. 188.) But Smith never did so, thereby depriving the trial court of the opportunity to exercise its discretion. Smith argues this failure "is of no moment, because such a request would have been futile" in light of the trial court's admonitions that it would not change course once the jury entered the

courtroom.[10] The only authority he cites to support this contention is *People v. Hill* (1998) 17 Cal.4th 800, which held that the failure to object at trial to alleged prosecutorial misconduct does not forfeit the issue on appeal if the objection or a curative admonition would have been futile. (*Id.* at p. 820.) Smith cited no authority applying this concept in the context of *Faretta* rights.

While this appeal was pending, the California Supreme Court decided *People v. Gomez* (2018) 6 Cal.5th 243 (*Gomez*), which involved a claim similar to Smith's in the analogous, albeit inverse, context of a capital defendant who argued the trial court's admonitions when allowing the defendant to revoke his self-represented status "amounted to a preemptive denial of [his] constitutional right to self-representation." (*Id.* at p. 269.) We asked the parties to submit supplemental briefing regarding the import, if any, of *Gomez* on the issue before us. The parties complied, and we have considered their submissions.

The defendant in *Gomez* was charged with several murder counts. (*Gomez*, *supra*, 6 Cal.5th at p. 250.) About nine months before trial, the defendant invoked his right to self-representation under *Faretta*. (*Gomez*, at p. 268.) The trial court granted the request, but warned the defendant, " '[Y]ou can't go back and forth on this. If you want to represent yourself, that's fine. That's going to cause a delay in the proceedings, and you just can't keep switching back and forth between being represented by counsel and

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10 Smith's assertion on appeal that "there is a significant likelihood [he] would have sought counsel had he not been told he was absolutely barred from doing so" is entirely speculative and self-serving.

representing yourself.' " (*Id*. at p. 269.) Two weeks later, however, the defendant sought to " 'relinquish' his pro se status and asked that the court reappoint counsel." (*Ibid*.) The court reminded the defendant it had warned him that he " 'can't switch back and forth,' " then reappointed counsel with the following admonition: "*I'm going to hold you to this kind of a change*. I think it's a good change for you. I think you're doing the right thing. All I'm saying is I'm not going to let you bounce back and forth. You have a right to represent yourself, I recognize that and gave that to you, and as of this moment you do represent yourself. And it's better for you and it's better for me as well to have an attorney who knows the rules and will effectively represent you to do that for you. So at this point you understand that if I'm going to change back, *this is a final change*." (*Ibid*., italics added.) The defendant was convicted and sentenced to death. (*Id.* at p. 250.)

On direct review, the Supreme Court concluded that although it was "inadvisable" for the trial court to suggest the defendant's pretrial decision must be " 'final,' " the admonition "was not erroneous." (See *Gomez, supra,* 6 Cal.5th at p. 272.) The court reasoned that because "a trial court may directly deny a *Faretta* request when it is designed 'to frustrate the orderly administration of justice,' " it follows that "courts are not foreclosed from preemptively discouraging such requests when it identifies a pattern of vacillation that, over time, will harm the progress of trial and the defendant's ability to put on a defense." (*Id*. at pp. 271-272.)

In reaching its conclusion, the Supreme Court discussed two of its earlier opinions that addressed the parameters for acceptable admonitions in similar circumstances. (*Gomez, supra*, 6 Cal.5th at pp. 269-272.) In *People v. Dent* (2003) 30 Cal.4th 213

(*Dent*), the Supreme Court found the trial court's admonition unacceptable because the lower court unequivocally told the defendant, " 'You cannot represent yourself in this matter.' " (*Id.* at p. 216.) The trial court also prevented the defendant from speaking to the court without attorneys present, and reiterated that the court was "not going to let him proceed pro. per. . . . Not in a death penalty murder trial." (*Id.* at p. 217.) The Supreme Court concluded these admonitions improperly "foreclosed any realistic possibility [the] defendant would perceive self-representation as an available option." (*Id.* at p. 219.)

On the other hand, in *People v. Lancaster* (2007) 41 Cal.4th 50 (*Lancaster*), the Supreme Court found the trial court's admonition acceptable even though the lower court told the defendant that his decision to relinquish his *Faretta* rights and have counsel appointed—his *fourth* such vacillation—" 'has to be a permanent decision on your part.' " (*Id.* at p. 69.) The trial court further warned, " 'Even if at some point you have some disagreement with what [your attorney] is doing, you can't just say now I'm back pro[.] per. That's a decision for the court to make, and it probably would not be in your favor.' " (*Ibid.*) The Supreme Court reasoned the trial "court's reference to the need for a 'permanent decision' . . . did not entirely foreclose the possibility of defendant's future self-representation . . . ." (*Ibid.*) Rather, "it told him it would make a decision on any renewed application, though the request would probably not be viewed with favor." (*Ibid.*)

The *Gomez* court found the admonitions before it were "more similar to *Lancaster* than *Dent*." (*Gomez, supra*, 6 Cal.5th at p. 271.) Whereas the trial court in *Dent* had unequivocally advised the defendant he could not represent himself, the trial courts in

Gomez and *Lancaster* had both confirmed the availability of the alternative form of representation. (*Gomez*, at p. 271.) The *Gomez* court rejected the defendant's assertion that "subtle distinctions in wording" in the *Lancaster* court's admonition—that the court would *consider* but *probably not view favorably* a subsequent request—left open " 'the possibility of . . . future self-representation,' " while the trial court in *Gomez* "told him unequivocally that future requests for self-representation would be denied." (*Gomez*, at p. 271.) The *Gomez* court explained, "*Lancaster* did not hold that had the trial court's comments been phrased in more certain terms, such comments would have amounted to reversible error. Instead, we commented that the trial court's reference to a 'permanent' decision may have been 'precipitous' due to the fact that trial was not imminent, but 'the impropriety was slight' and did not cause fundamental error." (*Ibid*.)

C. *Analysis*

In light of the principles discussed in *Gomez*, we conclude the trial court's admonitions here may have been "inadvisable," but they were "not erroneous." (See *Gomez, supra*, 6 Cal.5th at p. 272.)

As in *Lancaster* and *Gomez*, and unlike *Dent*, the trial court here clearly understood and expressed to Smith that he had the right to either represent himself or to have counsel appointed. Indeed, the court spent more than one week trying to persuade Smith that he would be better served being represented by experienced trial counsel. At the same time, the court made clear that Smith retained the right to represent himself and that the court would ultimately defer to his informed decision on the matter. The trial

court never unequivocally told Smith he had no right to counsel. (Cf. *Dent, supra,* 30 Cal.4th at p. 216 [" 'You cannot represent yourself in this matter.' "].)

The trial court's admonitions to Smith—telling him that once trial started, "You have to go all the way through" and "once I bring that jury in, no more. I'm not going to stop the trial"—were no more likely to dissuade a request to change representation than those the Supreme Court upheld in *Gomez*—" 'I'm going to hold you to this kind of a change' " and " 'this is a final change.' " (*Gomez, supra,* 6 Cal.5th at pp. 271-272.) Although the admonitions to Smith were more certain than those in *Lancaster,* where the court clearly indicated it would at least consider (but likely deny) a subsequent request, the *Gomez* court expressly rejected the argument that the *Lancaster* admonition was saved only by "subtle distinctions in wording." (*Gomez,* at p. 271 ["*Lancaster* did not hold that had the trial court's comments been phrased in more certain terms, such comments would have amounted to reversible error."].)

The overarching principle we discern from *Gomez* is that a reviewing court must determine whether a trial court's admonitions reflect legitimate concerns for the orderly administration of justice. (*Gomez, supra,* 6 Cal.5th at p. 271 ["courts are not foreclosed from preemptively discouraging" requests that the "court may directly deny"].) The *Dent* trial court's concern that the defendant not represent himself in a capital case was not legitimate because a defendant's *Faretta* rights apply even in capital cases. (*People v. Daniels* (2017) 3 Cal.5th 961, 985-986; *People v. Taylor* (2009) 47 Cal.4th 850, 865.) But the *Lancaster* and *Gomez* courts' concern over excessive vacillations was legitimate. (See *Gomez,* at pp. 271-272.) Indeed, the *Gomez* court concluded that even a single

vacillation made about nine months before trial was sufficient cause for concern. (*Id.* at pp. 269-271.)

The trial court's admonitions to Smith focused on empanelment of a jury. This was a legitimate concern. (See *Lawrence*, *supra*, 46 Cal.4th at p. 188.) A midtrial relinquishment of Smith's *Faretta* rights would have resulted in considerable delay and disruption. Appointing new counsel would have required a continuance to allow counsel to get up to speed on the case, and reappointing Smith's prior counsel would have required a continuance to allow him to finish his pending homicide trial and re-immerse himself in Smith's case. As in any case, the trial court could properly consider the disruption a potential midtrial request for a change in representation would impose on the jury. (*Lawrence*, at p. 188.)

But the trial court's concerns with the orderly administration of justice were amplified here because Smith and Moore were being tried jointly. (See *Lawrence*, *supra*, 46 Cal.4th at p. 195.) Once trial began, jeopardy attached to both defendants. If Moore consented to a continuance of the pending trial, the jury and the court would be inconvenienced. But if Moore did not consent to a continuance, the trial court would face a dilemma—it would have to either (1) sever the cases and allow Moore's trial to continue, which "would have resulted in the wasteful duplication of holding two trials involving many of the same events and witnesses" (*ibid.*); or (2) dismiss the jury and declare a mistrial, which "would have precluded a later trial, as [Moore] had already been placed in jeopardy" (*ibid.*). These concerns are a legitimate basis on which to deny a request to change forms of representation under appropriate circumstances. (*Ibid.*) And

because they are a legitimate basis on which to deny such a request, they are also a legitimate basis on which to "preemptively discourag[e]" the making of such a request. (See *Gomez*, *supra*, 6 Cal.5th at p. 271.)

We find unpersuasive Smith's argument that *Gomez*, *Lancaster*, and *Dent* are distinguishable because they "all involved the defendant's wish to *represent himself*," whereas here "the trial court was abridging Smith's *right to counsel*." (Italics added.) We find this distinction immaterial on the record before us. First, *Gomez* is more analogous and informative than any authority Smith has provided. Second, the record shows Smith made a knowing and intelligent choice between two constitutionally afforded forms of representation. The trial court went to great lengths to ensure Smith was aware of the potential consequences of his decision. Indeed, the court specifically addressed several of the issues he now cites as grounds for which he may have requested counsel during trial (e.g., unavailability of Deputy Medawar or her report, inability to view video files). Yet Smith knowingly and intelligently elected to represent himself at trial.

As in *Gomez*, although the trial court's admonition "was not erroneous" on the record before us, it may nonetheless have been "inadvisable." (*Gomez*, *supra*, 6 Cal.5th at p. 272.) A more advisable admonition would inform the defendant that the trial court retains the discretion to entertain a midtrial request to change the form of representation, but that the court may be unlikely to exercise that discretion favorably to the defendant under the circumstances. (See, e.g., *Lancaster*, *supra*, 41 Cal.4th at p. 69.) But, again, such "subtle distinctions in wording" (*Gomez*, at p. 271) do not render the trial court's admonitions to Smith erroneous.

III. *Firearm-use Enhancements*

When the trial court sentenced Moore and Smith, section 12022.53, subdivision (h) prohibited the trial court from striking the firearm enhancements set forth in that code section. (Former § 12022.53, subd. (h) ["the court *shall not* strike an allegation under this section"], italics added.) The Legislature has since amended this subdivision so that now "[t]he court *may*, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h), italics added.) The current iteration further provides, "The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (*Ibid*.)

Moore and Smith contend, and the Attorney General concedes, that the amendment to section 12022.53 applies retroactively and the matter should be remanded for resentencing. We agree. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.) Accordingly, on remand, the trial court must exercise its newly vested discretion under section 12022.53, subdivision (h) to determine whether to strike the enhancement under section 12022.53, subdivision (b) attached to each defendant's convictions. We express no opinion on how the trial court should exercise its discretion in this regard.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. The trial court is directed to exercise its discretion under section 12022.53, subdivision (h) to determine whether to strike the firearm enhancements under section 12022.53, subdivision (b). Upon resentencing, the trial court is directed to issue a new abstract of

judgment and to forward it to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.